

1 SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 COUNTY OF KING  
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4 AMELIA RENFROE,

5 Appellant,

6 vs.

7 STATE OF WASHINGTON,  
8 DEPARTMENT OF LICENSING

9 Respondent.

NO. 05-2-35626-0 SEA

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11 Transcript of Proceedings  
12 As Reported from CD Rom  
13 BEFORE HEARING OFFICER ESTERELLA  
14 July 12, 2006  
15 Olympia, Washington  
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20 Transcribed by:

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1 MS. ESTERELLA: Hi, this is an administrative  
2 hearing by phone before the Department of Licensing in the State of  
3 Washington. Today's date is August 1st, and the time is  
4 approximately 10 a.m. This hearing is being held by digital  
5 recording. The Petitioner, Amelia Renfroe, has requested this  
6 hearing to challenge the Department's suspension of her driving  
7 privilege as a result of an arrest that occurred on May 17, 2005.  
8 This hearing is a result of a remand from the Superior Court. Judge  
9 Lau remanded this hearing for the taking of testimony from Dr. Barry  
10 Logan. Joining me today by phone is Petitioner through Counsel.  
11 Counsel, could you identify yourself for the record, please.

12 MS. LUNDIN: Absolutely, good morning. This  
13 Diana Lundin appearing on behalf of Mr. Vargas for Ms. Renfroe.

14 MS. ESTERELLA: Okay. And joining me today  
15 in person is State Toxicologist Barry Logan. Dr. Logan, can I have  
16 you raise your right hand, please? Do you swear under the penalty  
17 of perjury under the laws of the State of Washington that any  
18 testimony that you provide during this hearing will be the truth?

19 DR. LOGAN: I do.

20 MS. ESTERELLA: All right.

21  
22 (Dr. Barry Logan is duly sworn.)  
23

24 MS. ESTERELLA: Also joining us today is Susan  
25 (unintelligible) DanPullo from the Attorney General's Office. Ms.

1 DanPullo, can you identify yourself for the record and state your  
2 position and purpose at the hearing?

3 MS. DANPULLO: Susan (unintelligible)

4 DanPullo, I'm Assistant Attorney General, I'm here representing the  
5 Department today.

6 MS. ESTERELLA: And joining us for the  
7 purposes of observation is Hearing Officer Ann Lang. I am  
8 (unintelligible), I've been appointed by the Director of the  
9 Department of Licensing to preside over this hearing and to issue a  
10 final judgment in this matter. Okay. So let's move on to Exhibit --  
11 The first exhibit the Department has offered is a DUI Breath Report  
12 submitted by Trooper Brock of the Washington State Patrol is  
13 labeled Exhibit 1 and consecutively numbered pages 1 through 11.  
14 Counsel, any objection to the admission of that document?

15 MS. LUNDIN: No objection.

16 MS. ESTERELLA: All right. Let the record  
17 reflect that Exhibit 1 was admitted into evidence.

18  
19 (Exhibit 1 is admitted into the  
20 record.)

21  
22 MS. ESTERELLA: The second document the  
23 Department has offered for the purposes of this hearing is labeled  
24 Exhibit 2 in the upper right-hand corner, it is a declaration signed by  
25 Dr. Barry Logan, and it makes reference to the (unintelligible)

1 thermometers used to measure the temperature of the simulator  
2 solution in a BAC Datamaster and the Datamaster CDM machines.  
3 It was executed in March of 2005. Counsel, any objection to the  
4 admission of that document?

5 MS. LUNDIN: No objection.

6 MS. ESTERELLA: All right. Let the record  
7 reflect Exhibit 2 is admitted into evidence.

8  
9 (Exhibit 2 is admitted into the  
10 record.)

11  
12 MS. ESTERELLA: Since this hearing has been  
13 convened primarily to take the testimony of Dr. Logan we will begin  
14 speaking with him at this time. Counsel, your witness has been  
15 sworn, you can begin.

16 MS. DANPULLO: Actually, before we begin, can  
17 I just make an opening.

18 FEMALE: (Unintelligible).

19 MS. DANPULLO: I'm sorry, before we begin can  
20 I make a record?

21 MS. ESTERELLA: Sure.

22 MS. DANPULLO: I would just first of all like to  
23 just for the record object to the taking of Dr. Logan's testimony as  
24 he's an agency head. Typically agency heads are not supposed to  
25 be required to testify. It's my understanding from offers of proof that

1 mostly the testimony is regarding his thought processes in approval  
2 and in instituting WAC's, and for that reason we don't believe that  
3 his testimony is appropriate or necessary. With that on the record  
4 we can go ahead.

5 MS. ESTERELLA: The objection has been  
6 noted. Counsel, you can proceed.

7 **BARRY LOGAN,** having been previously sworn,  
8 testified as follows:

9  
10 **DIRECT EXAMINATION**

11 **BY MS. LUNDIN:**

12 Q Dr. Logan, now are you?

13 A Good morning, I'm just fine, thank you.

14 Q Good, very good. I'll try not to take up much of your time today. Dr.  
15 Logan, there's only one individual delegated the authority to act as a  
16 state toxicologist; is that correct?

17 A That's correct.

18 Q And that position has a level of authority that's senior to the other  
19 members of the breath testing program.

20 A That's correct.

21 Q And the laws relating to breath testing in Washington delegate  
22 certain power to the state toxicologist.

23 A That's correct.

24 Q And one of those powers is the (unintelligible) of procedure for the  
25 breath testing program.

1 A That's correct.

2 Q And there are detailed rules that (unintelligible) have to follow when  
3 administering the breath test.

4 A What rules are you referring to?

5 Q There are a set of rules that we (unintelligible) have to follow when  
6 they administer the breath test.

7 A There is a procedure that they follow when they conduct a breath  
8 test.

9 Q And that procedure was put in place by you acting under the  
10 authority given to you by the Legislature.

11 A Yes.

12 Q And that procedure exists to make sure that the results of the test  
13 are accurate or reliable.

14 A Yes.

15 Q And that procedure is based on scientific principles.

16 A Yes.

17 Q And you have numerous subordinates who work under your  
18 authority in the breath testing program, do you not?

19 A I do.

20 Q And those individuals influence those procedures throughout the  
21 day-to-day administration of the breath test program.

22 A They do.

23 Q Do you expect those individuals to adhere to those procedures for  
24 breath testing as you've promulgated them.

25 A I do.



1 Q None of those individuals are senior to you in the authority to  
2 institute changes to those rules; is that correct?

3 A When you're referencing rules are you talking about the policies and  
4 procedures of the breath test section?

5 Q Yes, I am.

6 A Um, any changes to the policy and procedures manual require my  
7 approval. The document does allow some latitude to the  
8 technicians in terms of exercising their professional judgment in the  
9 interpretation of those policies and procedures.

10 Q And some of those policies and procedures that were referred to are  
11 located in the Washington State Patrol policy and procedure manual  
12 dated 11-4-05.

13 A That is the current policy and procedures manual version, yes.

14 Q And that manual was approved by you.

15 A It was, yes.

16 Q Under what authority did you approve that manual?

17 A Under the authority delegated to me under 46-61-506.

18 Q Was that also pursuant to WAC 44-80-70?

19 A Let me have a look at that WAC.

20 Q Okay. If you need me to read you the (unintelligible) of it I'd be  
21 happy to.

22 A I have it in front of me. Okay. I'm reviewing 448-16-070, review  
23 approval and authorization of protocols and procedures and  
24 methods by the State Toxicologist. If I can just have a moment to  
25 read that.

1 Q Certainly. (pause)

2 A Yes. My approval of the policy and procedures manual would also  
3 be pursuant to 448-16-070.

4 Q Okay. And, just for the record, 070 delegates you the responsibility  
5 of promulgating procedures for breath testing in Washington;  
6 correct?

7 A Um, well, 448-16-070 was promulgated by me, so I don't think it  
8 delegates me that authority. It describes what the process for the  
9 management of the breath test program is, and within the program  
10 identifies that I have the authority to review, approve and authorize  
11 those protocols.

12 Q Okay. And regarding the State Patrol's manual, are you familiar with  
13 the contents of that manual?

14 A Yes, I am.

15 Q And the protocols contained therein are consistent with the intent to  
16 produce accurate and reliable breath test results; correct?

17 A Yes, they are.

18 Q Is it fair to say that those rules are necessary for proper breath  
19 testing?

20 A I'm not sure what you mean by proper breath testing.

21 Q In order to have an accurate and reliable breath test result, it's  
22 necessary that the procedures in that manual be followed; correct?

23 A Well, in order to have an efficient and reliable program it's  
24 necessary that the staff follow the guidance that I provided them in  
25 that program. I think that's different from the question of whether the



1 results of any individual tests are accurate and reliable.

2 Q Okay. The procedures in the manual relate to procedures both for  
3 breath testing machines and the thermometers used in those  
4 machines; correct?

5 A Amongst other things, yes.

6 Q Turning your attention to page 29 of that manual, do you have that  
7 in front of you?

8 A Yes, I do.

9 Q Page 29 begins a list of, um, a list of procedures, um, titled Quality  
10 Assurance Procedures; correct?

11 MS. ESTERELLA: Is it page 24 or page 29?

12 MS. LUNDIN: The one I'm looking at is on the website  
13 and it's on page 29, 29 and 49. I think the written version may have  
14 been different because mine are at page 24, as well. So the one I'm  
15 looking at is the one that's on the State Patrol's web site.

16 A What's the date? What's the number at the bottom of the page?

17 Q Oh, you know what, I'm sorry. The number at the bottom of the  
18 page is page 24, and on my computer it's 29, so I guess there must  
19 be some, um, preprinted stuff. So I'm only looking at page 24 of the  
20 manual.

21 A Okay, yeah, I have that in front of me.

22 Q And that's entitled Datamaster Quality Assurance Procedure;  
23 correct?

24 A Yes.

25 Q Okay. And that begins a list of, um, a list of procedures that a

1 breath test instrument is required to undergo in order to be accepted  
2 for use in your breath testing program.

3 A I'm sorry, Diana, ask me that question again.

4 Q Sure. That page begins a list of several procedures that the breath  
5 test instrument is required to undergo in order to be accepted for  
6 use in your breath testing program.

7 A Um, (pause) yeah. This is the first page of a multiple page  
8 document that describes all of the components of the quality  
9 procedures manual. And beginning on this page is the first of those  
10 procedures which is a series of electrical checks.

11 Q Okay. And the breath test instrument must undergo all of those  
12 checks; correct?

13 A That's correct.

14 Q If the machine doesn't undergo and pass all of those checks it can't  
15 be used.

16 A Um, well, the requirement is that each instrument undergoes this  
17 quality assurance procedure at least once a year, and then  
18 subsequent to the performance of a variety of different procedures  
19 that are identified midway down page 24. So if any step in this  
20 procedure was skipped the person responsible for that would be out  
21 of compliance with the policy and procedures manual.

22 Q Okay. And so the machine, if it doesn't go through each step of the  
23 procedure, can't be used; correct?

24 A Um, well, (pause) it --

25 Q (Unintelligible) it shouldn't be used?

- 1 A It should -- yeah, if the technician has not complied with the  
2 requirements of the policies and procedures manual with respect to  
3 the instrument then they should not put it in the field for use.
- 4 Q Okay. You would not allow it to be placed in the field for use;  
5 correct?
- 6 A If I was aware that it was out of compliance I would not allow it to be  
7 placed in the field for use.
- 8 Q Okay. And that's because without undergoing each step of that  
9 process there's no assurance of forensic acceptability; correct?
- 10 A No, I don't think that's the case. I think there's a minimum standard  
11 for accepting the forensic reliability and accuracy of the results, and  
12 those are the steps that are outlined in RCW 46.61.506 which  
13 includes the duplicate tests, the four blank tests, the control sample  
14 that's tested with every test, the requirement that the operator be  
15 certified to conduct the test, and the observation of the 15-minute  
16 waiting period. Those are the minimum standards by which you can  
17 achieve an accurate and reliable test provided those criteria are  
18 met. What the quality assurance program offers is an opportunity  
19 for long-term observation of the stability and reliability of the  
20 instruments as a whole and the appropriateness and adequacy of  
21 the procedures that are used to administer the program.
- 22 Q Okay. Dr. Logan, on top of page 24 do you see that it's entitled  
23 Datamaster Quality Assurance Procedure; correct?
- 24 A Yes.
- 25 Q Could you please read the first sentence underneath that?



1 A (Reading) The quality assurance procedure ensures the accuracy,  
2 precision and forensic acceptability of the Datamaster instrument for  
3 the purpose of quantitatively measuring the alcohol concentration of  
4 a person's breath.

5 Q Okay. So, based on that language, you would agree, would you not,  
6 that if a machine did not either undergo a quality assurance  
7 procedure or pass a quality assurance procedure that the forensic  
8 acceptability of the breath test may not be ensured.

9 A If you're talking about a breath test that has matched all the  
10 requirements of RCW 46.61.506 I believe that what the quality  
11 assurance procedure does is adds to my confidence in the reliability  
12 of that result. But I wouldn't substitute my assessment of the  
13 reliability of the test that has met those RCW requirements because  
14 of a deficiency or inadequacy in the quality assurance procedure.  
15 Remember the quality assurance procedure may be conducted as  
16 much as a year in advance of when the subject's breath test is  
17 conducted. So what's more relevant to assessing the accuracy and  
18 reliability of that subject's breath test is the performance of the  
19 instrument at the time of the test.

20 Q Okay. So the quality assurance procedure adds to your confidence  
21 and reliability in the breath test results; correct?

22 A Yes.

23 Q Okay. Now, the manual that I'm referring to here indicates that the  
24 quality assurance procedure must be done before the machine is  
25 used to provide evidentiary breath samples; is that correct?

1 A Yes. It says criteria one is prior to an instrument being installed in  
2 the field for evidentiary use.

3 Q Okay. Is it fair to say, then, that an instrument that does not have a  
4 QAP would not be approved to provide evidentiary samples?

5 A Well, I would be very careful about use of the word approval. The  
6 way in which that word is used in WAC 44-816 is with respect to  
7 type approval. So I have approved the type of instrument that is to  
8 be used in the State of Washington for evidential breath test. That's  
9 the Datamaster and the Datamaster CDM. When we talk about --  
10 so I'm very careful about how I use that term. I don't talk about  
11 approval of individual instruments.

12 Q Let me use a different term to see if that makes the question easier  
13 for you. Is it fair to say that an instrument that did not have a quality  
14 assurance procedure would not be allowed to provide evidentiary  
15 samples?

16 A Um, I would say that according to our policies and procedures it  
17 should not be placed in the field.

18 Q Okay. Is it fair to say that an instrument that failed the quality  
19 assurance procedure should not be placed in the field?

20 A Yes.

21 Q Okay. And turning, I believe, to page 39, but, again, my numbers  
22 may be (unintelligible) here, um, what I was referring to is the, um,  
23 (unintelligible) criteria for the thermometers that are used in breath  
24 testing in Washington. That's contained in the manual, as well.

25 MS. ESTERELLA: Do you have a page number at the

1 bottom? Because our page 39 isn't --

2 MS. LUNDIN: It's not, okay. It looks like it's going to  
3 be page 35.

4 A Page 35 in my copy of the policies and procedures manual is  
5 entitled "Simulator Thermometer Certification Policy and Protocol."

6 Q Yes, thank you. And does that page start a list of criteria that the  
7 thermometer must meet in order to be used in the State of  
8 Washington to provide evidentiary breath tests; correct?

9 A Yes, it does.

10 Q And, again, those criteria must be met before the thermometer can  
11 be used.

12 A According to our policies and procedures, yes.

13 Q Okay. Dr. Logan, you're familiar with RCW 46.61.506?

14 A Yes.

15 Q And section 48 delegates the authority to you to approve breath  
16 tested instruments.

17 A Yes.

18 Q And you have approved of only the Datamaster and the Datamaster  
19 CDM as breath test instruments in Washington.

20 A Yes.

21 Q That means that those are the only two types of instruments that can  
22 be used to provide evidentiary breath tests in Washington.

23 A Yes.

24 Q So, for example, an intoxilizer is a type of breath testing instrument  
25 that's not approved to provide breath samples in Washington.



1 A Correct.

2 Q Washington purchases the Datamaster and the Datamaster CDM  
3 from National (unintelligible) Analytic Systems; correct?

4 A Correct.

5 Q So you require that National (unintelligible) installs specific software  
6 in the machines that you purchase.

7 A Correct. Well, yes.

8 Q And that software is customized for Washington breath testing.

9 A Yes.

10 Q And you would not approve a machine unless it contains that  
11 specialized software; correct?

12 A Um, (pause) well, (pause) there are several different versions of  
13 software that allow the Datamaster to operate. The ones that are  
14 approved by me for use in the State of Washington have been  
15 specifically approved. So any other type of, any other version of  
16 software would not be approved for use in a Datamaster in  
17 Washington.

18 Q Okay. So you would not approve a machine unless it contained that  
19 approved software even if it was a Datamaster or Datamaster CDM.

20 A Well, the Datamaster and the Datamaster CDM were approved with,  
21 um, with the Washington software installed.

22 Q Okay. So if you had a Datamaster machine that didn't have the  
23 approved software in it, that would not be an approved machine.

24 A Well, it would still be a Datamaster or a Datamaster CDM, so it  
25 would be approved per WAC 448-16. But it would not be able to

1 give a breath test, or it may not be able to give a breath test in  
2 compliance with the rest of that RCW.

3 Q Okay. So it couldn't be placed in the field for evidentiary testing.

4 A It should not be placed in the field for evidentiary breath testing.

5 Q Okay. So in order for a breath test instrument to be used in  
6 Washington to provide evidentiary breath samples it would have to  
7 be, number one, a Datamaster or Datamaster CDM. Number two,  
8 contain the approved software. And, number three, meet the criteria  
9 of the manual. Is that correct?

10 A I'm sorry, your premise was that that's, in order for it to be placed  
11 in service for evidential breath testing?

12 Q Yes.

13 A That's correct.

14 Q Okay. And if any one of those things does not occur then the  
15 machine should not be used.

16 A Per my directions to the staff of the breath test program if they have  
17 instruments that are out of compliance with our policies and  
18 procedures they should not be used.

19 Q And on March 31 of 2006 you authored a letter stating that on March  
20 21st of 2006 it was discovered that Datamaster 949273 located in  
21 Chelan County did not undergo a quality assurance procedure.

22 A I did.

23 Q You addressed -- well, in that letter you indicated that local  
24 prosecutors and Department of Licensing hearing examiners had  
25 been notified of that problem; correct?

1 A Yes.

2 Q The letter states that the machine was out of compliance from  
3 (unintelligible) 1st of 2005 'til March 21st of 2006.

4 A Yes.

5 Q It was out of compliance with the criteria of the manual.

6 A Yes.

7 Q Because of that it could not be used to provide evidentiary breath  
8 tests.

9 A It should not have been placed in the field for the conducting of  
10 evidential breath tests.

11 Q And that's true even though it was actually a Datamaster that was  
12 used; correct?

13 A That's correct.

14 Q So, although it was the type that you had allowed it still couldn't be  
15 used.

16 A Well, I mean, it could be used and it was used, and results were  
17 generated, and as far as I'm aware the results were accurate and  
18 reliable per the criteria of RCW 46.61.506. I don't know to what  
19 degree the instrument being out of compliance with our policies and  
20 procedures affected the admissibility of those breath test results.  
21 But (unintelligible) --

22 Q Okay. According to your testimony the machine shouldn't have --

23 MS. DANPULLO: Objection. (Unintelligible)

24 MS. ESTERELLA: Counsel.

25 MS. DANPULLO: I'd ask that the witness be allowed to



1 finish his --

2 MS. LUNDIN: Oh, I'm sorry, were you still going?

3 THE WITNESS: Yes.

4 MS. ESTERELLA: All right, Mr. Logan?

5 A (Continued) The reason this letter was generated was that when it  
6 came to my attention that we were, in fact, not in compliance with  
7 our own policies and procedures in consultation with my legal  
8 counsel in the Attorney General's Office we reached the conclusion  
9 that we had an obligation under Brady to disclose the fact that we  
10 were aware of this lack of compliance. And that's the reason this  
11 notice was published on the web site.

12 Q Okay. And according to your testimony today that machine  
13 should not have been used.

14 A Since the technician had not complied with my policies the quality  
15 assurance procedures it should not have been placed in the field for  
16 use, that's correct.

17 Q And that's true even though it was a Datamaster.

18 A That's correct. Even though it was an approved instrument it should  
19 not have been placed in the field.

20 Q On March 25, 2005 you authored a declaration entitled  
21 "Thermometers Approved to Measure the Temperature of Simulator  
22 Solution."

23 A Yes.

24 Q Can you please describe the circumstances under which that  
25 declaration was drafted?

1 A Um, I don't recall all the circumstances at this point. It was a result  
2 of conversations between myself and Mr. Craig Nelson of  
3 Department of Licensing with respect to information that needed to  
4 be before the hearings examiner during a hearing. We discussed  
5 the issues that needed to be part of that record, and between he  
6 and I there were several drafts of a declaration prepared. Once I  
7 had edited it to the point where I was comfortable with it I signed it.

8 Q Okay. Is it fair to say that that declaration was solicited by the  
9 Department of Licensing?

10 A Uh, yes.

11 Q And that was for the purpose of admitting it at Department of  
12 Licensing hearings?

13 A Um, I'm not sure exactly what the express purpose was, but that was  
14 my understanding is that it would be admitted into testimony. Of my  
15 testimony.

16 Q That declaration was obtained in lieu of your live testimony at those  
17 hearings; correct?

18 A Yes.

19 Q And in identifying the Datamaster and the CDM as the only two  
20 instruments approved for use.

21 A Yes.

22 Q And it does the same for thermometers, it delineates two types of  
23 thermometers that can be used.

24 A Yes.

25 Q It also contains a statement related to operator certification.

1 A Yes.

2 Q And, correct me if I'm wrong, but in effect what that statement says  
3 is that anyone who has a valid permit card is trained and certified to  
4 conduct tests of Datamasters, Datamaster CMS's, and portable  
5 breath testing devices.

6 A Yes.

7 Q Those permit cards bear your signature as required; correct?

8 A Yes.

9 Q (Unintelligible) any documents prior to signing those permit cards;  
10 correct?

11 A I beg your pardon?

12 Q You don't consult any documents prior to signing those permit cards;  
13 correct?

14 A Well, the permit cards are preprinted with a facsimile signature.  
15 They're printed on 8-1/2 by 11 card stock, and the instructors  
16 conduct the classes according to the approved outlines. If an  
17 individual meets the criteria, passes the test, then the instructor  
18 generates the permit card by printing the specifics of that individual's  
19 authorizations and certifications on the card. So I don't review the  
20 results of the tests for individual classes. There are probably a  
21 couple of hundred of them a year. And I do not handle the cards, or  
22 see the permit cards, before they are issued to the operators who  
23 have gone through that process.

24 Q Okay. So you don't write in or type in the names yourself.

25 A That's correct. There are approximately 6,000 operators in this



1 state.

2 Q Okay. And you don't give any kind of approval for the name to be  
3 printed on the card personally.

4 A Um, well, I think that is implicit by virtue of the fact that I have  
5 certified the instructors through instruction and examination to be  
6 instructors. They have to show their qualifications and attain that  
7 level of certification. They are teaching from an outline that I have  
8 personally reviewed and inspected including the test that's to be  
9 administered. And they're given specific guidance about how the  
10 subjects have to perform, how the candidates have to perform in  
11 that examination in order to be certified. So they're following a  
12 procedure that I have approved and delegated.

13 Q Okay. So you don't have any role in the actual processing of the  
14 cards at all.

15 A That's correct.

16 Q You don't attend the classes, do you?

17 A I do not.

18 Q So you don't attend refresher classes.

19 A I do not.

20 Q So you didn't actually certify in this particular case, for example,  
21 Trooper Brock, to conduct the test.

22 A Um, I believe I did certify him by virtue of the process that I had put  
23 in place for the testing or the examination of individuals to be  
24 certified as operators.

25 Q Okay. So it's fair to say that you delegated the authority to test

1 individuals and certify them to other instructors.

2 A Well, certification comes from me by virtue of my rule as head of this  
3 program, but I do not personally administer the tests to all of these  
4 officers who come for training and certification, that's done by  
5 instructors operating under my authority.

6 Q Okay. But you delegated the authority, then, to conduct the classes  
7 to be an instructor.

8 MS. DANPULLO: Objection; asked and answered.

9 Q And these instructors, then, produce permit cards for people who  
10 have met qualifications for the classes.

11 A They do produce the permit cards, yes. Or effectively they send a  
12 list of individuals who have successfully completed the training to  
13 the headquarters of the breath test section on Roanoke Street, and  
14 the administrative staff in the Roanoke office print the cards  
15 according to the information they've received from the instructors.

16 Q Okay. And you don't play any role in that actual logistical process.

17 A That's correct.

18 Q Dr. Logan, thank you very much. I don't have any additional  
19 questions today, but I do very much appreciate your time this  
20 morning.

21 A You're welcome, thank you.

22 MS. DANPULLO: I just want to clarify a couple  
23 statements that you made. You indicated that the, for the minimal  
24 forensic acceptability of the breath test the requirements  
25 of RCW 46.61.506(4)(a) are what is required for a valid breath test.

1 THE WITNESS: That's correct.

2 MS. ESTERELLA: All right, Counsel, anything further?

3 MS. LUNDIN: Just one follow-up question to that.

4 Dr. Logan, the policies that you have promulgated in your  
5 manual. Do you believe that they are an important part of the breath  
6 testing program; correct?

7 THE WITNESS: Yes.

8 MS. LUNDIN: Thank you. No further questions.

9 MS. DANPULLO: Thank you. No further questions.

10 MS. ESTERELLA: I have a couple follow-up.

11 **EXAMINATION**

12 **BY MS. ESTERELLA:**

13 Q How do you know what software was contained in the machine?

14 A The software version appears at the top or in the header of each  
15 breath test document that's printed on a Datamaster or Datamaster  
16 CDM.

17 Q And who would be the custodian of those records?

18 A The breath test technician.

19 Q And is there a difference between what you would require for a  
20 machine to be placed in the field versus what is an approved  
21 machine?

22 A Yes. The term approved, as I testified, references to what's called  
23 type of approval which is recognition of the fact that the Datamaster  
24 instrument as manufactured is capable of performing accurate and  
25 reliable tests when operated in a manner consistent with our breath



1 test protocol. So any Datamaster, whether it's sitting with the  
2 manufacturer or sitting in the State of Washington or, in fact, for that  
3 matter sitting in another state, is an approved instrument. In order  
4 for it to be used consistent with our policies and procedures there  
5 are additional requirements that we would have to meet, part of what  
6 I've outlined in the policy and procedures manual; namely,  
7 compliance with quality assurance procedure, the keeping of certain  
8 records, how these records are stored, how those records are  
9 disclosed. So that's the purpose of the policy and procedures  
10 manual. But in my view the approval of the instrument is different  
11 from the program requirements for the instrument.

12 Q Is a machine only approved if it's both the type of machine and if it  
13 passes the quality assurance procedures?

14 A Um, no, no, you could have a Datamaster which would be an  
15 approved instrument which does not or cannot pass the quality  
16 assurance procedure. And that instrument, although it's an  
17 approved instrument, should not be used in the field.

18 Q The letter that was referred to earlier about the Chelan County  
19 instrument that you stated was out of compliance, did you  
20 disapprove that machine at any time?

21 A No. It was still a Datamaster, so it was still per 448-16, an approved  
22 instrument, it was just not operated or maintained in compliance with  
23 our policies and procedures.

24 Q In the letter that you sent out, at no time in the letter did you say that  
25 this was not an approved instrument; is that correct?

1 A Can I have a look at that letter? That's correct.

2 Q Was the purpose of the letter just to give notice that there might be,  
3 that Counsel could possibly challenge the reliability of the test?

4 A Well, it's been my experience that defense counsel routinely  
5 introduces documents from the breath test program to question the  
6 weight that should be given to the results of an individual's breath  
7 test; whether this instrument's maintenance records, or the results of  
8 simulator tests and other individual's tests. All those results are  
9 posted and records are posted on the state patrol's web site. The  
10 fact that this Datamaster had not gone through the quality  
11 assurance procedure as required in the policies and procedures  
12 manual would also have been evident if somebody had scrutinized  
13 the records that were on the web site. However, this was uncovered  
14 by the breath test section and not by anybody else who might have  
15 been looking at those records. Since it had come to my attention I  
16 felt we had an obligation to bring it to the attention of other people  
17 who may be relying on those records.

18 Q The RCW 46.61.506(4)(a) that sets forth what's required for  
19 admissibility of a breath test, do you believe that's a minimum  
20 requirement to establish accuracy and reliability in each individual  
21 test?

22 A Yes.

23 MS. DANPULLO: I have no further questions. I would  
24 ask that this letter be marked and admitted. I don't know if it's  
25 anywhere else, but because it's been referenced I think it's

1 important.

2 MS. ESTERELLA: I do believe it's part of Counsel's  
3 prior record on this remand. But I will take that and incorporate it  
4 into the record. Counsel, do you have anything further?

5 MS. LUNDIN: I've got two brief questions, please. Dr.  
6 Logan, just because you've approved a type of instrument does not  
7 mean that it's being used to produce evidentiary results; correct?

8 THE WITNESS: (pause) Um, (pause) yes. Just  
9 because an instrument is a Datamaster does not mean that it is  
10 necessarily capable of giving reliable evidentiary results.

11 MS. LUNDIN: And you would not authorize such  
12 a machine for use if it does not meet the compliance requirements  
13 of the manual.

14 THE WITNESS: Yeah. My expectation would be that  
15 anybody who works in the program that I supervise, if they were  
16 aware that an instrument was out of compliance with our policies  
17 and procedures it should not be placed into use in the  
18 (unintelligible).

19 MS. LUNDIN: I don't have any further questions, thank  
20 you.

21 MS. DANPULLO: I don't, either.

22 MS. ESTERELLA: All right, Counsel, you can proceed  
23 to argument.

24 MS. LUNDIN: Great, thank you. Well, (unintelligible),  
25 as you know Mr. Vargas was the attorney of record in Ms.



1 Renfroe's case (unintelligible). I don't know how extensive his oral  
2 argument was, I don't want to reiterate everything that he's already  
3 said. I think the argument remains the same as it was initially, and  
4 that is that in order for the breath test results of a person's  
5 test to be admitted in the State of Washington it has to meet the  
6 requirements for RCW 46.61.506. (Unintelligible), as we've all  
7 discussed, requires that the test be performed on the instrument  
8 approved by the state toxicologist. Dr. Logan has approved  
9 two types of instruments, the Datamaster and the Datamaster CDM.  
10 Dr. Logan has made that approval exclusive which means that other  
11 types of instruments cannot be used in Washington, are not  
12 approved for use in Washington to provide evidentiary breath  
13 samples. Dr. Logan's testimony today indicates that simply having  
14 the type of Datamaster is not the only thing sufficient to authorize a  
15 machine for use. The machine must also undergo the quality  
16 assurance procedure, the criteria that we referred to today in the  
17 manual. And that where a machine is out of compliance with those  
18 requirements the machine should not be used. I think we've all  
19 gotten really technical with the term approval because that's the  
20 term of art, as it were, in the RCW. The fact of the matter remains  
21 that if a machine does not meet the criteria of the manual the  
22 machine is not authorized for use. Dr. Logan would not put  
23 it into service, He expects his breath test technicians  
24 not to put that machine into service, and if it is put into service  
25 obviously it's still capable of producing a breath test result

1 that might comply with the eight additional criteria  
2 listed under (4)(a), but it is not the forensic acceptability of that test,  
3 the reliability of that test is not in short where the quality assurance  
4 procedure was not performed. And that's I think is reflected in the  
5 Chelan County letter that we talked about today. So the  
6 requirement of (4)(a) clearly is that there be an approved instrument  
7 that was used. Documents that you have before you today in Exhibit  
8 1 and Exhibit 2 reflect that the machine used in this case was of the  
9 type that is allowed, it is the approved type of instrument. However,  
10 these documents do not reflect compliance with the manual,  
11 don't reflect compliance with the quality assurance procedure. The  
12 Department's burden would be to produce evidence that the  
13 machine was in compliance with the manual and that the breath test  
14 results were conducted pursuant to that compliance. No  
15 such evidence has been provided, and on that basis I would move  
16 to suppress the results of the breath test based on the lack of  
17 foundation and ask that the Department dismiss the matter.

18 MS. ESTERELLA: Anything further?

19 MS. DANPULLO: Could I make brief argument?

20 MS. ESTERELLA: Sure.

21 MS. DANPULLO: We would just argue, the  
22 Department would argue that the machine was approved by Dr.  
23 Logan, as indicated in his testimony. The thermometer was also  
24 approved. What Dr. Logan's testimony established is that he also  
25 has additional requirements for liability that is part of the breath test

1 program; that that gives him more confidence in the test; but that  
2 once it's performed on an approved test with an approved machine  
3 on an approved thermometer and meets the criteria of RCW  
4 46.61.506(4)(a) that that demonstrates that the test is reliable and  
5 accurate and demonstrates that the machine itself is capable of  
6 producing a reliable and accurate test. Additionally, case law is well  
7 established in State v. Smith that no quality assurance procedure is  
8 required to be established prior to admissibility. The new statute did  
9 not change that, and Counsel in this case for the Petitioners  
10 attempting to get around that case law and is trying to say that Dr.  
11 Logan only approves testing machines once they also pass the  
12 quality assurance procedure, and that wasn't his testimony.

13 MS. ESTERELLA: All right, Counsel, I will take your  
14 arguments under advisement. You should hear from me in  
15 approximately 30 business days. As usual I do believe that your  
16 client's ability to drive has been extended, so she may continue to  
17 drive as long as nothing has happened to affect the validity of her  
18 driving privilege in the State of Washington. If there's nothing else  
19 we can conclude the hearing. Goodbye.

20  
21 (RECORD CLOSED)  
22  
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1  
2  
3 CERTIFICATE  
4

5 I, Lisa Alger, do hereby certify:

6 That I am a certified court reporter for the State of  
7 Washington.

8 That I am not a relative, employee, attorney or counsel of any  
9 of the parties to the above-referenced action, and am not a relative  
10 or employee of any attorney or counsel in the above-referenced  
11 case, and that I am not financially interested in the above action or  
12 its outcome.

13 That I have transcribed the CD-ROM of the proceeding  
14 held in the above-entitled case and certify that the transcript is a  
15 true and correct transcript of all audible portions of the taped  
16 testimony, including questions and answers, all objections, motions  
17 and exceptions of counsel made and taken at the time of the  
18 foregoing proceedings. Areas of the CD-ROM which were not  
19 decipherable are noted as "(INAUDIBLE)" or "(UNINTELLIGIBLE)".

20 That the transcript consists of 29 pages.

21 Signed and dated at Roy, Washington, this 8th day of  
22 August, 2006.

23  
24  
25  
*Lisa Alger*  
\_\_\_\_\_  
Lisa Alger, Transcriber  
Certified Shorthand Reporter  
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